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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

KIRK L. WHITCOMBE, Petitioner

v.

WEYERHAEUSER CORPORATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIRK L. WHITCOMBE, Pro Se
43909 Southeast Tanner
Road, Lot #5
North Bend, WA 98045
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QUESTIONS PRESENTED

1. Whether the finding of waiver by Petitioner of his State of Washington guaranteed right to jury trial without evidentiary substantiation of the requisite intent to relinquish such right constituted reversible error and deprived Petitioner of such right without due process of law under the 14th Amendment of the United States Constitution.

2. Whether Civil Rule 38, State of Washington Rules of Civil Procedure for Superior Court, as implemented and interpreted by the State Trial Court (King County Superior Court), and subsequently by the State Appellate Courts through the Washington Supreme Court, deprived Petitioner of his state

established inviolate right to jury trial without due process of law, contrary to the 14th Amendment to the United States Constitution.

3. Whether the U.S. District Court for the Western District of Washington at Seattle erred in holding that Petitioner's due process Complaint should have been raised by appeal from the decision of the Washington State Supreme Court denying Petition for review, whereas such constitutional violation was confirmed for the first time at the Supreme Appellate level when the Washington State Court of Appeals, Division I, with the ratification of the Washington State Supreme Court, declined, for the first time, to adopt a construction of Washington Civil Rule 38, comporting with due process and where Petitioner's due process claims had not been expressly raised or

litigated in the State Court proceedings.

4. Whether Petitioner's due process claims are barred by the doctrine of collateral estoppel.

5. Whether Petitioner's constitutional due process claims against the Washington State Courts and Judges under 42 USC § 1983 are barred by their immunity under the Eleventh Amendment or doctorine of absolute judicial immunity.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Kirk L. Whitcombe, and the Respondents, Weyerhauser Corporation, State of Washington, Washington State Supreme Court, Washington State Court of Appeals, Division I, Superior Court of Washington for King County, King County Superior Court Judges: Judge David W. Soukup, Judge Shannon, Judge Weatherall, and Judge William C. Goodloe, (now retired), Washington Supreme Court Justice, Washington State Appellate Clerk Richard D. Taylor, Washington State Commissioner, Larry A. Jordan, and Washington State Appellate Judges: Judge Solie M. Ringold, Judge Herbert M. Swanson, and Judge H. J. Coleman, and Washington State Supreme Court Clerk, Reginald N. Shriver.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is unpublished. The Memorandum decision of July 12, 1990, is reprinted in the Appendix hereto, page 1a, infra.

The Order of the United States District Court, Western District of Washington, at Seattle, on Plaintiff's Motion For Reconsideration, entered March 9, 1988, has not been reported. It is reprinted in the Appendix hereto, page 6a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the Petitioner brought this suit in the U.S. District Court for the Western District of Washington at Tacoma on August 25, 1987, which case was later transferred to the Division at Seattle. On January 19, 1988, Petitioner's District Court action was dismissed on Defendant, Weyerhaeuser's Motion for Dismissal or for Summary Judgment. On March 9, 1988, the District Court's Order on Plaintiff's Motion for Reconsideration was entered denying Petitioner's Motion For Reconsideration of earlier dismissal.

On July 12, 1990, Memorandum decision was entered by the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court. Subsequently, on September 5, 1990, Order of the United

States Court of Appeals for the Ninth Circuit was entered denying Petitioner's Petition For Rehearing and rejecting Petitioner's suggestion for a rehearing en banc. This certiorari is being docketed within 90 days from the denial of rehearing below.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND COURT RULES INVOLVED

Art. 1,§ 21, Washington State Constitution:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Rule 38, Rules For Superior Court, State of Washington:

RULE 38. JURY TRIAL OF RIGHT

(-) **Defined.** A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

(a) **Right of Jury Trial Preserved.** The right of trial by jury as declared by Article 1 § 21 of the Constitution or

as given by a statute shall be preserved to the parties inviolate.

(b) **Demand for Jury.** At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing, by filing the demand with the clerk, and by paying the jury fee required by law. If before the case is called to be set for trial no party serves or files a demand that the case be tried by a jury of twelve, it shall be tried by a jury of six members with the concurrence of five being required to reach a verdict.

(c) **Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded

trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver of Jury.** The failure of a party to serve a demand as required by this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) [Return of Jury Fee--When Forfeited.] [Rescinded effective August 7, 1981.]

[Amended effective January 1, 1972; July 20, 1973; August 7, 1981.]

SECTION 1, AMENDMENT XIV, UNITED STATES CONSTITUTION.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In September 1981, Petitioner, through counsel, filed a Complaint against Respondent Weyerhauser Corporation in King County Superior Court, State of Washington, alleging that in August of 1981 Respondent had breached a written contract with Petitioner. Petitioner's counsel thereafter noted the case for trial as a non-jury case, without Petitioner's knowledge, authorization, or consent, and, in March of 1982, the case was set for a non-jury trial to be heard January 12, 1983. At no time was Petitioner notified or given knowledge that his case was going to be set as a non-jury trial until an occasion shortly before August 25, 1982, when Petitioner's motion for jury trial was denied by King County Superior Court Judge Soukup.

On November 10, 1982, Petitioner was permitted to amend said Complaint to introduce new causes of action. Although such amendment revived Petitioner's right to a jury trial according to Washington State Law, Petitioner's second motion for jury trial, through counsel, was denied on December 3, 1982. On November 22, 1983, a third motion for jury trial was denied, although Petitioner again adamantly denied that he had knowingly or voluntarily waived his right to jury trial. The fee tendered in connection with demand for jury trial was not returned.

Petitioner's non-jury trial involving his causes of action against the Respondent was commenced on January 3, 1984 and continued through March 28, 1984. An oral decision was rendered March 28th, substantially in favor of

Respondent Weyerhauser Corporation. Petitioner filed a Petition under Chapter 7 of the U.S. Bankruptcy Code in U.S. District Court for the Western District of Washington on May 24, 1984. Subsequently, on February 4, 1985, Petitioner's motion for reconsideration of the King County Superior Court decision against him was denied.

On March 5, 1985, Petitioner appealed his two and one-half (2 1/2) month long trial, and the decision against him with the Washington State Court of Appeals, Division I, in which the basis of appeal was limited to the three (3) lower court denials of his right to jury trial. Such appeal was vigorously opposed by the Respondent Weyerhauser Corporation, as were Petitioner's three (3) previous motions for jury trial in King County Superior Court. On November 7, 1986, Appellate

Court Commissioner, Larry A. Jordan, granted Respondent's Motion on the Merits. On December 22, 1986, Petitioner's Petition, through counsel, to modify Commissioner's ruling, was denied by Appellate Judges Solie M. Ringold, Herbert A. Swanson, and J. H. Coleman.

On January 20, 1987, Petitioner's counsel filed Petitioner's Petition for review to the Supreme Court of the State of Washington. On February 19, 1987, Petitioner filed a supplemental note to the Washington Supreme Court because of attorney omissions and for Plaintiff's personal considerations. On April 2, 1987, the Washington State Supreme Court denied the Petition for review and Petitioner's personally submitted plea, case en banc, without written opinion or explanation in spite of counsel's urging that "it is exceedingly important that

the Civil Rules of this state either be changed to expressly address this situation, or that an appellate court address this matter by written opinion," P. 18, Petition for review.

Petitioner's first motion for jury trial was filed in a relatively short period of time after Petitioner was first apprised of the unauthorized filing of a request for non-jury trial following return from the State of Alaska where Petitioner had been employed for a considerable length of time. Petitioner had neither authorized nor known about the prior scheduling of non-jury trial, and no evidence of any such authorization or knowledge was provided Judge Soukup prior to his ruling denying Petitioner's demanded jury trial.

Petitioner, through counsel, filed a second motion for jury trial, which

right had been revived by virtue of Superior Court order entered November 10, 1982, authorizing the amendment of Petitioner's Complaint to add an entirely new cause of action. Such second motion, filed November 24, 1982, was denied on December 3, 1982, by Judge Shannon Weatherall, King County Superior Court Judge, reasoning that Washington State Civil Rule 38 required Petitioner to demand a jury trial immediately upon Respondent Weyerhauser's spontaneous oral motion in open court for continuance of the pending trial date. Said motion for continuance was made spontaneously, without prior notice, at the hearing upon Petitioner's motion for amendment on November 10, 1982. Such implemented time limitation for the filing of demand for jury trial was thus effectively implemented without prior notice. A second determination and

finding of waiver was thus made on December 3, 1982, in the absence of any offering of an evidentary or factual showing of intent or authorization to waive.

Following the dismissal of Petitioner's appeal by ruling of Court of Appeals' Court Commissioner and denial of Petitioner's Petition for review to the Washington State Supreme Court, Petitioner filed his Complaint under 28 USC § 1983 on August 21, 1987 in U.S. District Court, Western District of Washington at Tacoma, which action was shortly transferred to the Seattle Division, asserting that the denials of Petitioner's inviolate right to jury trial under the laws and Constitution of the State of Washington violated Petitioner's due process rights under the 14th Amendment of the United States Constitution and were actionable under

42 USC § 1983. Thereafter, on January 20, 1988, the District Court granted Respondent's motion for dismissal on the basis that the 14th Amendment's due process clause did not require state courts to provide jury trials in civil cases. Subsequently, on March 9, 1988, in response to Petitioner's motion for reconsideration, the District Court, although agreeing that it had initially misapprehended the federal claim and that it did indeed state a claim under the Federal Constitution in alleging that Petitioner had been deprived of his state established right to a jury trial without due process of law, nevertheless dismissed the action on the grounds of collateral estoppel. In so ruling, the District Court found that Petitioner had already litigated, with Weyerhauser, his right to a jury trial and was therefore barred from attempting to relitigate his

action in the form of a § 1983 action. Petitioner's 14th Amendment action against the State of Washington was determined to be barred by the 11th Amendment and not actionable under § 1983. The District Court further determined that Petitioner's action against the various judges and judicial officers under § 1983 were barred under the doctrine of absolute judicial immunity. The District Court's order on Petitioner's motion for reconsideration, dismissing such causes of action, was entered March 9, 1988. A further minute order was entered May 23, 1988, denying Petitioner's motion for reconsideration or clarification.

Petitioner's notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed April 4, 1988. Appellate briefs were filed by Petitioner, Weyerhauser Corporation, and

the State of Washington on September 12, 1988, October 13, 1998, and September 30, 1988, respectively.

On July 12, 1990, the United States Court of Appeals, Ninth Circuit, filed its memorandum decision affirming the judgment of the District Court, noting initially, without factual support, that Petitioner had waived his right to jury trial from the outset in the state court proceeding and suggesting that proceedings thereafter involved repeated attempts to revoke the initial waiver. The dismissal of the Complaint against Weyerhauser was affirmed on the basis that Petitioner had failed to allege facts showing Weyerhauser or its personnel had engaged in a conspiracy with public officials. The dismissal of the Washington State Courts was affirmed on the basis of immunity under the 11th Amendment. The dismissal of the

Washington State Court Judges and Shriver was affirmed on the basis of judicial immunity. On July 25, 1990, Petitioner filed his Petition for rehearing with suggestion for rehearing en banc. The order denying and rejecting Petitioner's Petition for rehearing and suggestion for rehearing en banc was filed September 5, 1990.

REASONS FOR GRANTING THE WRIT

Petitioner's federal question involves one of exceptional importance--whether Petitioner's state established right to jury right was twice breached by Respondents in a manner violative of the 14th Amendment of the United States Constitution and actionable under 42 USC § 1983, acting under color of a Washington State Court Rule, Civil Rule 38, in arbitrarily concluding that Petitioner had waived his rights in the absence of any evidence of voluntary relinquishment or waiver. Civil Rule 38, as adopted in the State of Washington, is derived from the Federal Civil Rule 38, from which numerous comparable Civil Rules with reference to the right to jury trial in civil cases and manner of implementation thereof have been derived and adopted in numerous states throughout the land.

This case poses significant questions concerning the degree to which such procedural rights, though state created, can be conditioned, restricted, or impaired under 14th Amendmend due process guidelines, and the extent to which state court litigants can summon the aid of the federal court system, as guardians of federal Constitutional rights, when it is perceived that such rights are being unduly impaired or jeopardized.

The Ninth Circuit Court of Appeals, to which this Petition is directed, never addressed or answered Petitioner's federal complaint and question, the decision of the U.S. District Court for the Western District of Washington at Seattle, or any of Petitioner's issues presented for review. The Court of Appeals' inaction has left Petitioner's federal complaint and question still

unanswered. The Appellate Court's naked statement, without facts, and concluding from the onset, "that Whitcombe first waived his right to a jury trial," is nothing less than an arbitrary finding, totally lacking in any U.S. Constitutional 14th Amendment due process and equal protection scrutiny. The Appellate Court's inaction on this matter deserves U.S. Supreme Court attention if Petitioner's 14th Amendment right to due process is going to be properly enforced. Even in the case of Thomas v. Arn, 474 U.S. ____, 88 L. Ed.2d 435, the lower court's finding of waiver of right to appeal, based upon noncompliance with a court implemented procedural rule, was very carefully scrutinized and considered before being upheld, the court noting that rules of procedure should work to promote, rather than defeat, the ends of justice. As

will be further discussed below, the U.S. District Court and the Ninth Circuit Court of Appeals have refused to address Petitioner's federal questions on the merits even in the face of the extreme grievances expressed by Petitioner concerning action on the part of the State of Washington trial and appellate Courts in declaring a waiver of valuable right to jury trial based upon implementation of a procedural rule, namely Civil Rule 38, establishing, in the particular context of the implementation of such rule, virtually no notice or opportunity to be heard. In the Memorandum Decision of July 12, 1990, the Ninth Circuit Court of Appeals proceeded immediately under the assumption and premise that Petitioner had waived his rights without reviewing or scrutinizing the alleged basis of waiver in the first place.

Neither the District Court or the Court of Appeals have effectively considered the question as to how a valuable right, such as right to jury trial, can be lost, given a requisite of basic due process under the 14th Amendment, on the basis of an artificial, legal fiction of waiver premised upon a procedural rule affording neither prior notice or opportunity to be heard, nor a proper forum in which to adjudicate the factual question as to whether the requisite intent to waive or relinquish had been established.

As is manifestly evident from the record of lower court proceedings, the initial finding of waiver of right to jury trial was based upon action of Petitioner's counsel in initially noting Petitioner's contractual action in King County Superior Court, State of Washington, for trial. However, there

is absolutely no evidentary support or basis suggesting that such action on the part of counsel was either authorized or even known by the Petitioner at the time it was implemented. In Petitioner's original Complaint and pleadings thereafter, Petitioner has repeatedly complained that, at no point along the proceedings, was Petitioner provided advanced notice informing him that the court could set Petitioner's case as a non-jury trial without Petitioner's specific authorization, knowledge, and consent.

Although Petitioner's right to jury trial was clearly revived upon the King County Superior Court's granting of his motion to add new causes of action, absolutely no prior notice of a time or procedure for demanding jury trial of a case which had already been scheduled for trial was provided. The Superior

Court ruled that Petitioner should have immediately and, in effect, instinctively demanded a jury upon the Defendant's motion for trial continuance which was in open court and previously unannounced, being made spontaneously in the process of responding to Petitioner's motion for amendment of complaint. Although Petitioner moved for jury trial within two (2) weeks of said hearing on motion for amendment of complaint, his failure to immediately demand a jury in response to the Defendant's motion for continuance at such hearing, has been found to constitute a waiver of his jury trial rights under Civil Rule 38, Rules of Superior Court for the State of Washington.

Thus, the initial setting of Petitioner's case as a non-jury trial was done as a result of documents signed

and filed by his counsel wihout prior notice. The second "waiver" of right to jury trial was in the above context of the hearing upon Petitioner's motion to amend, where Petitioner failed to demand a jury in immediate response to the Respondent's spontaneous motion for continuance.

The pertinent requirements of Rule 38, Rules for Superior Court, as adopted in the State of Washington, and which do not initially appear overly burdensome on their face, are as follows:

RULE 38 JURY TRIAL OF RIGHT

(-) **Defined.** A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact.

(a) **Right of Jury Trial Preserved.** The right of trial by jury as declared

by Article 1 § 21 of the Constitution or as given by a statute shall be preserved to the parties inviolate.

(2) **Demand for Jury.** At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing, by filing the damand with the clerk, and by paying the jury fee required by law. If before the case is called to be set for trial no party serves or files a demand that the case be tried by a jury of twelve, it shall be tried by a jury of six members with with the concurrence of five being required to reach a verdict...

(d) **Waiver of Jury.** The failure of a party to serve a demand as required by

this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

The problem with the above rule, giving rise to the significant due process concerns in this case, was in its implementation. The imposed deadline for serving demand for jury trial was that time when the case was to be called to be set for trial. Unfortunately, the case had already been set for trial even though Petitioner's right to jury trial had clearly been revived upon the granting of his motion for amendment to add additional cause of action to his Complaint. The King

County Superior Court, Judge Weatherall, subsequently ruled, in connection with Petitioner's second motion for jury trial, that the demand should have been made immediately upon the Respondent's Weyerhauser's motion for continuance, since arguably, the result of that would have been to set a new date for trial. Unfortunately, as previously stated, Petitioner had been given no prior notice of Respondent's motion and, even if Petitioner had been so previously notified, it is not clear from Rule 38 that the hearing upon a motion for continuance sets a new deadline for demand for jury trial. Any suggestion that Civil Rule 38, as implemented in the Petitioner's case, comported with the 14th Amendment due process in terms of the reasonableness of notice afforded Petitioner is farcical in the extreme. Yet that appeared to be the reasoning of

the Motions Judge in King County Superior Court and that, evidently, of the Washington State Court of Appeals and Supreme Court in failing to reverse the Superior Court ruling. The Constitutional defectiveness of such implementation of Rule 38 was not expressly argued in any of the phases of Petitioner's litigation in the Washington State Court System through the Petition for review to the Wasington State Supreme Court. That was simply because it was never dreamed that the Washington State Court system would approve or adopt such a fundamentally unfair, strained, and unconstitutional implementation of Rule 38. Petitioner could not have appealed such state court rulings because the fundamental federal question addressed herein was not asserted or involved in such proceedings. It is submitted that the

state court proceedings through Petition to the Washington State Supreme Court, rather than constituting a forum for resolution of Petitioner's federal due process complaint, constituted the state action giving rise to Petitioner's 42 USC § 1983 cause of action. Stated another way, the state court proceedings, rather than constituting a forum for the resolution of Petitioner's due process problem, actually manifested the problem. Arguably, Rule 38 could have been construed, utilizing the court's powers of reasonable construction, so as to avoid the present constitutional dilemma, It was only upon the final affirmation and approval of the King County Superior Court's constitutionally indefensible implementation and interpretation of Civil Rule 38, that the availability of a direct constitutional challenge upon

such implementation was confirmed to Petitioner" satisfaction. Until such serious infringements upon supposedly inviolate rights are redressed and brought under control at the federal level, there is great reason for concern that innumerable state court litigants will continue to encounter similar encroachments upon fundamental rights in the avowed interests of judicial economy and efficiency.

As stated in the case of Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950) at p. 314:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendancy of the action and afford them the opportunity to present their objections."

Failure to give notice violates "the most rudimentary demands of due

process of law." Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

There is no doubt that the denial of Petitioner's jury trial rights had serious consequences. King County Superior Court held a two and one-half month non-jury trial at the taxpayers' expense. The resulting $368,000.00 judgment against Petitioner forced him into bankruptcy, and into liquidating his company, laying off his crew, and making it impossible for him to get credit to support his diminished livelihood. There is no question that the procedures giving rise to such judicial liens are subect to the basic requirements of due process. Mitchell v. W. T. Grant Company, 416 U.S. 600 (1974); Hodge v. Muscatine County, 196 U.S. 276 (1905); Peralta v. Heights Medical Center, Inc., d/b/a Heights Hospital, et al., 484 U.S. 80 (1987).

Washington State Civil Rule 38, as interpreted by the Washsington State Courts through the highest level, and as heretofore sanctioned by the U.S. District Court and U.S. Ninth Circuit Court of Appeals, in declining to sustain Petitioner's challenge thereof, is arbitrary and has been implemented in a manner such as to deny fundamental rights of due process under the 14th Amendment to the United States Constitution. In refusing to seriously take up such constitutional defects, the U.S. District Court and Court of Appeals have further served to frustrate the vindication of the Petitioner's constitutional rights. Bailey v. Alabama, 219 U.S. 219, 55 L. Ed. 191; 31 Sup. Ct. Rep. 145.

Another question which the lower courts have refused to consider or tackle in the proceedings below, is that

of whether an attorney for a party has implied authority to waive a valuable right, such as the right to trial by jury, on behalf of such party. That pertinent part of the rule in question, Civil Rule 38(d), as adopted for use by the Superior Courts in the State of Washington, provides:

> "The failure of a party to serve a demand as required by this rule, to file it as required by the rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by <u>him</u> of trial by jury." (Emphasis added).

In view of the express use of the word "party" and "him" in the rule, a significant question is raised as to what authority there may be for permitting a court to judge the actions

of a party's lawyers in determining whether or not such a significant personal right as right to trial by jury has been waived. Clearly, attorneys do not have the authority to waive the right to trial by jury in criminal proceedings. It was manifestly unfair for the lower courts to make a conclusive finding of waiver based solely upon the actions of counsel without at least some evidence supporting the granting ofsuch authority or legal precedent establishing such authority. Actually, the available authority is quite to the contrary. In the State of Washington an attorney has no authority to surrender or waive such a valuable right as that of right to trial by jury. Graves v. P. J. Taggeres Company, 94 Wn.2d 298, 616 P.2d 1223 (1980).

The decision of the Ninth Circuit Court of Appeals in conclusively observing that Petitioner first waived his right to a jury trial, flies in the face of Barnhill v. Rubin, 46 F.Supp. 963, which held that a waiver of rights must be done knowingly and in possession of the pertinent facts. Petitioner, however, has emphatically denied knowledge and/or possession of the requisite facts to properly waive his right to jury trial, and not one piece of evidence has been produced by the Respondents or any other party in any of the lower court proceedings even suggesting that Petitioner had the requisite knowledge and possession of facts to properly waive his right to jury trial. The willingness of the courts to justify a finding of waiver of significant procedural right under such circumstances raises grave doubts and

questions as to whether the Petitioner's due process and equal protection rights have been properly safeguarded and the actions of the Respondents and courts below properly scrutinized.

The essence of Petitioner's claim under 42 USC § 1983 was the abrogation of Petitioner's inviolate right to jury trial by the Washington State Courts, Judges, and Weyerhauser Corporation acting "under color of the law", under guise of Court Rule 38. Field v. Clark, 143 U.S. 649. Even though Petitioner's right to jury trial was based upon a Washington State, rather than United States Constitutional mandate, significant due process considerations are nevertheless brought into play. As stated in Evitts v. Lucey, 469 U.S. 387 (1985), at p. 401;

". . . when a state opts to act in a field where its action has

> significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause."

A very stringent word is employed in the Washington State Constitution in establishing the right to jury trial in civil cases, namely that the right to jury trial shall be preserved "inviolate".

In assessing the extreme significance of such procedural right it is submitted that it is not inappropriate to draw from the federal authorities. As stated in Beacon Theaters, Inc., v. Westover, U.S. District Judge, et al., 359 U.S. 500 (1959):

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and juris prudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care."

The Ninth Circuit Court of Appeals correctly observed that the state judiciary, including judges and clerks, have discretionary powers over citizens' state established rights, but such discretion is clearly bounded by the rules and principles of law, and are not to be arbitrary, capricious, or unrestrained.

None of the Respondents weighed any facts to determine whether Petitioner had waived his state established rights, for no such facts had been provided. It

is thus submitted that it was not within the permissible discretion of the Respondents to determine that Petitioner's rights had been waived or abandoned. In so finding, the State of Washington, including the State judges at all levels, exceeded the limits of judicial discretion and thus are liable under 42 USC § 1983.

The Ninth Circuit Court of Appeals, in its memorandum filed on July 12, 1990, affirmed the dismissals of the Washington State Court Judge's, and Ann Shriver, on the basis of absolute judicial immunity, apparently even from actions brought under 42 USC § 1983. Such dismissals, however, were clearly in error. It has been conclusively determined that judicial immunity is not a bar to prospective injunctive relief under 42 USC § 1983 against a judicial officer acting in a judicial capacity.

Puliam v. Allen, 466 U.S. 522 (1983). Presumably, such relief could be in the form of injunction or writ of mandamus. As observed in Pulliam v. Allen, at p. 540:

> "Congress enacted § 1983 and its predecessor, § 2 of the Civil Rights Act of 1966, 14 Stat. 27, to provide an independent avenue for protection of Federal Constitutional rights. The remedy was considered necessary because 'state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.' . . . "

and at pp. 540 and 541:

> "Subsequent interpretations of the Civil Rights Acts by this Court acknowledge Congress' intent to reach unconstitutional actions by all state actors, including judges. . . .
>
> The interpretation in Ex parte Virginia ofCongress' intent in enacting the Civil Rights Acts has not lost its force with the passage of time. In Mitchum v. Foster, supra, the Court found § 1983 to be an explicit exception to the anti-injunction statute,

> citing Ex parte Virginia, for the proposition that the 'very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the peoples' federal rights--to protect the people from unconstitutional action under color of state law,' whether that action be executive, legislative, or judicial.' . . .
>
> We remain steadfast in our conclusion...that Congress intended § 1983 to be an independant protection for federal rights and find nothing to suggest that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from federal collateral review."

42 USC § 1983 has been found to constitute a waiver not only of judicial immunity, but Eleventh Amendment Immunity of state officers and agencies. Supreme Court of VA v. Consumers Union, 446 U.S. 719 (1980); Hutto v. Finney, 437 U.S. 678 (1978). Thus, the Ninth Circuit Court of Appeals clearly erred in affirming the dismissal of the

Washington State Court on the basis of the Eleventh Amendment immunity.

The asserted basis for dismissal of the Respondent Weyerhauser Corporation in the Ninth Circuit Court of Appeals memorandum of July 12, 1990, was the claimed failure of Petitioner to allege facts showing engagement of personnel of the Weyerhauser Corporation in a conspiracy with public officials. It is respectfully submitted that such basis of dismissal was glaringly inaccurate factually. In the first place, it must be kept in mind that these proceedings never advanced beyond the initial pleadings stages. Nevertheless, in paragraph 2.3 of Petitioner's verified complaint filed in United States District Court, Western District of Washington at Tacoma, which was later transferred to the Seattle Court, it is alleged that "Weyerhauser is a

corporation with corporate offices in King County. At all times material herein, Respondent, Weyerhauser was jointly and severally responsible and acted in concert with the other Respondents by petitioning, moving, and advocating interpretations of Washington State Civil Rule 38(b) under color of state law with the result of obtaining the denial of the Petitioner's inviolate rights to a civil jury trial and due process of law." Clearly from the record of the lower court proceedings, Petitioner's complaints re. denial of jury trial were advanced all the way through the Washington State Court hierarchy, including Court of Appeals and to the Supreme Court. At each step along the way, the Respondent, Weyerhauser clearly resisted Petitioner's appeal and argued strongly in defense of the lower court's denials

of Petitioner's repeated demands for jury trial. A stronger showing of active involvement and collaboration by Weyerhauser could not have been shown short of some claim of personal infiltration into the court system itself. Weyerhauser at all times strenuously objected to the granting of a jury trial and openly advocated against the setting of a jury trial at all times, employing arguments which became adopted as the reasoning of the Washington Courts at the various stages from Superior Court level up to the Washington State Supreme Court, in turning down Petitioner's numerous jury trial demands.

Finally, although not specifically addressed in the memorandum decision of July 12, 1990, the District Court's asserted basis for the dismissal of the 1983 action, as to Weyerhauser, deserves

comment. The avowed basis was that Plaintiff (Petitioner in this proceeding), had already litigated with Weyerhauser his right to a jury trial in the Washington State Courts. In the first place, as previously stated, Petitioner's Federal 14th Amendment constitutional attack on the denial of his demand for jury trial, as implemented under Rule 38, was not expressly consideraded or litigated in the Washington State proceedings. Petitioner primarily contended for a reasonable interpretation and implementation of Civil Rule 38, which, if adopted, would have obviated a direct constitutional confrontation. Petitioners constitutional claim, indeed, was not fully perfected until such reasonable construction of such civil rule was ultimately rejected at

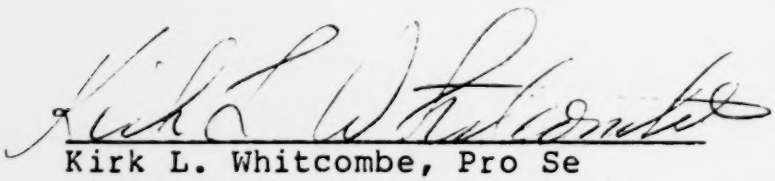
the highest Washington State Court level.

Furthermore, to suggest that Petitioner's crucial constitutional complaint was fully litigated at the state court level and to so accede to the Respondent's collateral estoppel argument is somewhat analogous to suggesting that it is fair and proper to allow the gorged fox to be the final arbitor as to whether he properly handled his guarding of the henhouse. After all, the complaint addressed in this federal action is not simply against Weyerhauser, but against actions of the courts and judges of the State of Washington in failing to properly safeguard significant federal constitutional rights.

CONCLUSION

It is respectfully submitted that, for the reasons as enumerated above, this Petition should be granted.

Respectfully submitted:



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MEMORANDUM DECISION OF UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, BEFORE CIRCUIT JUDGES NORRIS, WIGGINS, AND KOZINSKI:

Whitcombe appeals the dismissal of his 42 U.S.C. § 1983 suit against the Weyerhaeuser Corporation, Washington state courts, and various employees of the Washington courts. We affirm.

I

In 1981, Whitcombe filed suit for breach of contract against the Weyerhaeuser Corporation in Washington state court. In that action Whitcombe first waived a jury trial. Although he subsequently and repeatedly moved to revoke that waiver, his motions were denied and he received a bench trial. Judgment was ultimately entered for Weyerhaeuser. Whitcombe appealed through the Washington state courts on

the ground that the trial court erred in denying him a jury trial in violation of Washington State Civil Court Rule 38(b). Whitcombe lost on appeal.

Whitcombe then filed suit in federal court pursuant to section 1983 asserting that the Washington court's refusal to grant him a jury trial denied him due process. His federal suit alleges that Weyerhaeuser, the Washington courts and judges, and the Washington Supreme Court clerk, Reginald Shriver, conspired to deny him his right to a jury trial. Whitcombe sought damages and an order granting him a new trial before a jury. The district court granted defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

II

We review de novo the district court's dismissal for failure to state a claim. Woodrum v. Woodward County, 866 F.2d 1121, 1124 (9th Cir. 1989).

A. Weyerhaeuser Corporation

In order to state a claim under section 1983 against private persons, Whitcombe must allege facts which show that those persons are engaged in a conspiracy with public officials. United Steelworkers of America v. Phelps Dodge, 865 F.2d 1539, 1540 (9th Cir. 1988), cert. denied, 110 S. Ct. 51 (1989). In his complaint, Whitcombe does no more than simply state that Weyerhaeuser and Washington State court officials conspired to deprive him of his right to a jury trial. Vague and conclusory allegations of participation in civil rights violations are insufficient to

withstand a motion to dismiss. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). Whitcombe's failure to allege any facts showing an agreement to deprive Whitcombe of his right to due process requires we affirm the dismissal of his complaint against Weyerhaeuser.

B. Washington State Courts

The eleventh amendment requires the dismissal of the Washington state courts. The eleventh amendment bars suits naming state agencies as defendants even if the plaintiff seeks injunctive relief. V.O. Motors, Inc. v. California State Board of Equalization, 691 F.2d 871, 872 (9th Cir. That bar applies to section 1983 actions. Quern v. Jordan, 440 U.S. 332, 344 (1979). Washington has not waived its eleventh amendment immunity. McConnell v. Critchlow, 661 F.2d 116, 117 (9th Cir. 1981). We therefore affirm the dismissal of the Washington State courts.

C. Washington State Court Judges and Shriver

We affirm the dismissal of the Washington State court judges and Shriver. Judges are not liable "for civil actions for their judicial acts, even when such acts are alleged to have been done maliciously or corruptly." Stump v. Sparkman, 435 U.S. 349, 356 (1978). The denial of a motion for a jury trial was a judicial act for which the judges were entitled to absolute immunity. Likewise, Shriver is entitled to derived judicial immunity because he is performing an integral part of the judicial process. See Lonneker Farms v. Klobucher, 804 F.2d 1096, 1097 (9th Cir. 1986).

The judgment is AFFIRMED.

ORDER OF UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE IN CAUSE NO. C87-1143C ON PLAINTIFF'S MOTION FOR RECONSIDERATION, ENTERED MARCH 9, 1988 PER JUDGE JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE:

THIS MATTER is before the Court on plaintiff Whitcombe's motion for reconsideration of an order dismissing this action. Oral argument has not been requested.

The Court did misapprehend the plaintiff's theory of the case in its order dismissing the action. Plaintiff's theory is not that the federal constitution requires the State of Washington to provide him a jury trial; rather, it is that having elected to provide the right to a jury trial, the State must comply with due process in denying that right to him. This does state a claim under the federal constitution. Evitts v. Lucey, 469 U.S. 387, 400-01 (1985). However,

plaintiff's motion must still be denied for the following reasons.

Weyerhaeuser. Plaintiff complains that he was unconstitutionally denied his right to a jury trial. However, the plaintiff has already litigated with Weyerhaeuser his right to a jury trial. The plaintiff cannot relitigate his action against Weyerhaeuser in the form of a § 1983 action; his proper remedy against Weyerhaeuser was to appeal the Washington State Supreme Court's decision. Migra v. Warren City School Dist. Bd of Education, 465 U.S. 75 (1984).

Washington State. Plaintiff's claim for damages against Washington State is barred by the 11th Amendment. Quern v. Jordan, 440 U.S. 332, 337 (1979). Although plaintiff correctly asserts that the 14th Amendment gives Congress the power to provide for

for private suits against States which would otherwise be constitutionally impermissible, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), Congress has not exercised that power in the context of § 1983 actions. Id. at 452.

Judges and Judicial officers.

Plaintiff alleges that various judges and judicial officers violated his due process rights by denying his motions for a jury trial. Judges and judicial officers performing judicial functions are entitled to absolute immunity from § 1983 suits. Dennis v. Sparks, 449 U.S. 24, 27 (1980) (judges); Wiggins v. New Mexico State Supreme Court Clerk, 664 F.2d 812, 815 (10th Cir. 1981) (clerks). The defendant judges and clerks were all clearly functioning within their judicial roles in performing the acts described in the

plaintiff's complaint. Therefore, plaintiff is not entitled to maintain his action against them.

Order

For the foregoing reasons, Plaintiff's motion for reconsideration is DENIED.

The Clerk of the Court is directed to send uncertified copies of this Order to the pro se plaintiff and to all counsel of record.

DATED this 9th day of March, 1988.

John C. Coughenour
United States District Judge

(2)

No. 90-910

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

KIRK L. WHITCOMBE,

Petitioner,

v.

WEYERHAEUSER CORPORATION, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying the doctrines of sovereign immunity and judicial immunity to dismiss petitioner's 42 U.S.C. § 1983 claims?

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

Facts of the case are fully set forth and fairly presented in the opinion of the court below. (Pet., App., pp. 1A - 5A.)

ARGUMENT

A. INTRODUCTION

What is presented in this case is an attempt by petitioner to avoid application of the long-standing doctrines of sovereign immunity and judicial immunity to the 42 U.S.C. § 1983 claims presented. Petitioner remarkably asserts that states, judges, courts, and judicial officers are not entitled to judicial immunity for § 1983 claims for damages under *Pulliam v. Allen*, 466 U.S. 522 (1984); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980); and *Hutto v.*

Finney, 437 U.S. 678 (1978), irrespective of the nature of the alleged unconstitutional acts or prayers for relief. These cases are not in conflict with the ruling of the court below. The court below has properly and fairly denied petitioner's claims.

B. THE RULING OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF ANY OTHER FEDERAL COURT.

1. *Pulliam v. Allen, 466 U.S. 522 (1984), and Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980), Are Not in Conflict With the Ruling of the Court Below.*

The Court of Appeals for the Ninth Circuit was correct in dismissing petitioner's claims against judges, courts, and judicial officers under the doctrine of judicial immunity.

In order to prevail, petitioner must convince this Court to disregard the nature of the acts of the judges and judicial officers, the prayer for relief, and a body of case law which is unequivocally in favor of judicial immunity.

The Supreme Court has long recognized that judicial immunity bars § 1983 actions against courts and judges for discretionary judicial acts. *Bradley v. Fisher*, 80 U.S. 335 (1872); *Dennis v. Sparks*, 449 U.S. 24 (1980); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978). The same reasoning has been applied to judicial officers including court clerks. *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812 (10th Cir. 1981); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1987). Liability will not be imposed even if an action was in error. *Pierson v. Ray*, 386 U.S. 547 (1967).

Petitioner has made a claim for damages against respondent judges and judicial officers for acts which are unquestionably discretionary judicial acts. No prospective relief enjoining judicial acts has been sought or awarded. Consequently, the limited holdings of the cases cited by petitioner as conflicting with the decision of the court below are not controlling.

Pulliam v. Allen's narrow holding is inapplicable to this case. The claims are dissimilar, as are the prayers for relief. In *Pulliam*, the Supreme Court's actual holding was

> We conclude that judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity.

Pulliam, 466 U.S. at 541.

Since 1868, the Supreme Court has, as the dissent in *Pulliam* stated, consistently held

> that judges are absolutely immune from civil suits for damages. *See, e.g., Stump v. Sparkman*, 435 U.S. 349, 55 L. Ed.2d 331, 98 S.Ct. 1099 (1978); *Pierson v. Ray*, 386 U.S. 547, 18 L. Ed.2d 288, 87 S.Ct. 1213 (1967); *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed 646 (1872); *Randall v. Brigham*, 7 Wall 523, 19 L. Ed. 285 (1869).

Pulliam, 466 U.S. at 545.

Again in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980), the Supreme Court stated

> Adhering to the doctrine of *Bradley v. Fisher*, 13 Wall 335, 20 L. Ed. 646 (1872), we have held that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities.

The narrow holding in *Virginia* does not support petitioner's claims. The Virginia Supreme Court had enforcement powers for a code of conduct for the state bar association. This Court held that judicial immunity does not shield the Virginia Court and its Chief Justice from § 1983 actions when acting in their enforcement capacities. *Id.* at 736.

It was the nature of the enforcement powers being exercised, not discretionary judicial acts, which resulted in a holding that the *Virginia* Court was not immune. The respondents exercised no similar powers in petitioner's case. Clearly, the holding in *Virginia* is not in conflict with the decision of the court below.

2. *The Decision of The Court Below Is Not In Conflict With The Holding in Hutto v. Finney, 437 U.S. 678 (1978).*

The Supreme Court in *Hutto* held that a state was not immune under the eleventh amendment for violating a remedial federal court order. Petitioner extrapolates the holding in *Hutto* to assert that states are not immune from all § 1983 actions. The holding in *Hutto* is a narrow exception to the doctrine of sovereign immunity solely for the purpose of federal enforcement actions under the fourteenth amendment. *Id.* at 693. Petitioner presents no such case to this Court.

It has been clearly and consistently held by the Supreme Court that states and their agencies are absolutely immune from § 1983 actions under the eleventh amendment to the United States Constitution. *Quern v. Jordan*, 440 U.S. 332, 344 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Papasan v. Allain*, 478 U.S. 265 (1986).

Even though states may waive immunity and consent to be sued in federal court, Washington State has not waived its sovereign immunity under the eleventh amendment. *McConnell v. Critchlow*, 661 F.2d 116, 117, (9th Cir. 1981).

CONCLUSION

The ruling by the court below that petitioner is barred from asserting his § 1983 claims against the state of Washington and the judges and judicial officers of Washington under the doctrines of sovereign immunity and judicial immunity was proper. The petitioner does not present an important question of federal law unsettled by this Court, or one in conflict with applicable decisions of this Court, or a case otherwise calling for the supervision of the Supreme Court of the United States. The long-standing doctrines of sovereign and judicial immunity should not be disturbed by accepting this insignificant case. The petition should be denied.

DATED: March 14, 1991.

Respectfully submitted,

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Assistant Attorney General
Attorneys for Respondent
State of Washington
**Counsel of Record*

No. 90-910

IN THE
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OCTOBER TERM, 1990

Kirk L. Whitcombe,

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Petitioner respectfully submits the following reply brief pursuant to Rule 15.6, Supreme Court Rules, in rebuttal to the false charactorization of Petitioner's case, as set forth in the brief of Respondents in opposition to Petition for Writ of Certiorari.

ARGUEMENT

1. Petitioner's Primary Request Was for Prospect Relief, Not Damages. Petitioner's primary Prayer For Relief was for a federal judicial mandate or mandamus compelling the reestablishment of his "inviolate", state-established right to a jury trial.

The sole basis for denial of writ, presented in Respondent's brief in opposition, was on the grounds of judicial immunity and upon implied theory that the sole basis of Petitioner's action in the court below was for damages. Nothing could be further from the truth. In the Prayer For Relief, as contained within pages 12-14 of the Verified Complaint filed in the United States District Court, Western District of Washington, at Tacoma, damages were optional and subordinate to the principal request that Petitioner be

afforded his State of Washington established "inviolate" right to a jury trial, and that he not be deprived of such significant rights contrary to due process, as afforded every citizen of the United States. Paragraph 2 of the Prayer For Relief, page 13 of said Verified Complaint, specificaly requests the following relief: "For a mandate order to the Supreme Court of Washington directing Washington State Supreme Court to direct the Washington King COunty Superior Court to grant Plaintiff a new trial of his causes of action against the Defendant, Weyerhaeuser Corporation, this time to be heard by jury pursuant to Washington State Law;"

2. Respondents' Characterization of Respondents' Actions Through The Various Levels of the State of Washington Court System in Depriving Petitioner of His Right to a Jury Trial as The Performance of

Discretionary Judicial Functions Have Been Seiously Placed in Question And Should Not Be Assumed as True and Correct.

Petitioner, in his Petition For Writ of Certiorari has clearly established the bold unmitigated denial of his right to a jury trial by Respondents pursuant to an extremely thinly fabricated theory or pretext of waiver, without any semblance of factual or evidentiary basis or showing of intent to waive. It is submitted that in fabricating a judicial finding of waiver, virtually out of thin air and totaly without evidentiary support, the State of Washington judges far exceeded the limits of judicial discretion as to result in the imposition of liability under 42 U.S.C. * 1983. Where there is total absence of conflicting testimony or other evidence through which a court would otherwise have to sift in arriving at a substantive or procedural

resolution, there is no context calling for the exercise of judicial discretion. What really was involved was capricious action in the guise of discreation and not properly protected under any modified doctrine of immuntiy.

The actions of the State of Washington court at its various levels in denying jury trial appeared to be performed more in the interests of administrative expedience or economy, rather than coming within any recognized domain of judicial discretion. Such administrative activity was far more analogous than anything else to the type of administrative or enforcement powers recognized in the case of Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) as not falling within the normal penumbra of judicial immunity.

Thus, the State of Washington judges and

judicial system, in addition to clearly not being immune from the imposition of prospective relief, as clearly requested by Petitioner in his Complaint, are, by the same token, equally bereft of judicial immunity for damage and/or punitive action under * 1983 where their actions clearly do not involve the exercise of appropriate judicial discretion but naked abuse of administrative power in an attempt to save perhaps a few tax dollars at the litigator's expense and deprivation of supposedly "inviolate" rights.

3. The State Court Judges and Judicial System as Necessary Parties in Supplying The Necessary State Action Nexus to * 1983 Actions Has Been Inappropriately Overlooked.

In all of the commotion and attention revolving around the presence of judges and the state judicial system as parties

Defendant, Weyerhaeuser Corporation, the essential relationship between such parties and the private Defendant Weyerhaeuser Corporation, indeed the very presence of Weyerhaeuser Corporation as a party, has been almost totaly ignored. Weyerhaeuser Corporation has not even been requested to respond to the Petition.

The Petitioner's purpose in commencing this litigation in District Court was not simply to collect as much damages as possible against any possible party Defendants, including the state court judges who heard his case. The whole thrust of the Petitioner's action was that he had been unfairly and unconstitutionaly deprived of his right to a juryt trial, contrary to federal due process, and such deprivation was the result of a conspiracy between the Defendant, Weyerhaeuser Corporation, and other parties Defendant. As the record of

documents filed in the lower court proceedings will reveal, Defendant Weyerhaeuser Corporation, was not a mere passive bystander in connection with the constitutional abuse that was heaped upon the Petitioner. Indeed, Weyerhaeuser Corporation, through counsel, was activelyu arguing, pleading, and urging all of the way, through all stages of the proceedings, that the actions asserted against it not be heard by a jury, but soley by a trial judge, without jury. It was indeed Weyerhaeuser, through counsel, that advanced all of the arguments that eventually persuaded the State of Washington judges from the trial court level to the State of Washington Supreme Court to rule that Petitioner should not be afforded a jury trial. As Petitioner has repeatedly urged, such rulings were made in the absence of the slightest probative evidence that the Petitioner had voluntarily waived his jury trial rights and without

affording the Petitioner a proper due process forum, including reasonable notice and opertunity to be heard in the process of defending and seeking to implement such rights. Such combined and cooperative effort on the part of all of the Defendants, including Weyerhaeuser Corporation, if nothing else, established the essential nexus between private and state action as to warrant the granting of relief under 42 U.S.C. * 1983. Phillips v. J. Mashburn, 746 F.2d 782 (1984). Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed. 2d 185 (1980).

Again, Petitioner's action was not limited soley to one for entry of Judgement for damages, but, significantly, included a Prayer For Prospective Relief, including the entry of such mandate Order as by Writ of Mandamus directing the conducting of a new Trial, such as by the State of Washinbton Superior Court for King County, as deemed

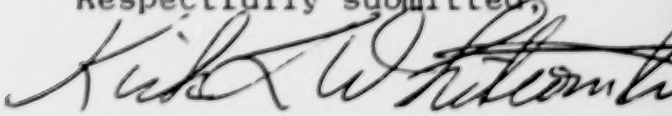
appropriate and constituting a jury of Petitioner's peers as the triar of fact. No persuasive argument, reasoning, or statement of authority has been provided in opposition to the granting of such relief.

4. CONCLUSION

No doctorines of sovereign or judicial immunity have been cited warranting the total dismissal and rejection of Petitioner's action brought in the United States District Court for the Western District of Washington. Indeed, no proper claim of entitlement to immunity has been established warranting the dismissal of any of the Defendants or denial of the Petition. If Respondents' arguments of immunity are upheld and the Petition denied, the next question raised is that of who will be the next citizen of the State of Washington to be arbitrarily denied his or her supposedly

"inviolate" right to a jury trial given the particular procedural scenario created in the State of Washington for the administration of such rights and the strained judicial implementation and interpretation thereof as exmplified in Petitioner's case. The granting of the Petition would serve greatly to resolve such doubt and uncertainty and return the "in" to "inviolate" once and for all.

Respectfully submitted,



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